

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**SECURUS TECHNOLOGIES, INC.  
PETITION FOR PARTIAL STAY OF ORDER ON RECONSIDERATION  
PENDING APPEAL  
(FCC 16-102)**

**PUBLIC VERSION**

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Dated: August 25, 2016

## SUMMARY

Securus respectfully seeks a stay of the new Inmate Calling Services (“ICS”) rates adopted in the *Order on Reconsideration*.<sup>1</sup> Due to the upcoming implementation deadline, Securus asks the Commission to resolve this Petition by **September 20, 2016**.

This Petition satisfies all four prongs of the test in *Virginia Petroleum Jobbers*, 259 F.2d 921 (D.C. Cir. 1958). First, Securus is likely to prevail in its appeal of the new ICS rates, because (1) they are below Securus’s costs of service as reported in its July 2014 Mandatory Data Collection submissions that have never been refuted or discredited, (2) they are not based on credible analysis, and (3) they do not account for the market realities that govern ICS which the Commission expressly acknowledges and yet refuses to address.

The FCC essentially has adopted the same rates that the U.S. Court of Appeals for the D.C. Circuit already stayed, merely adding unenforceable lip service to correctional facility costs without resolving the core issue – contract-based site commissions – that ICS carriers consistently have raised in this proceeding. Regardless of its disagreement with the petitioners’ positions, the Commission should acknowledge that, based on the prior stay orders, there are substantial legal issues raised on appeal.

Secondly, Securus will suffer irreparable and immediate harm if the new rates in the *Order on Reconsideration* become effective. This harm is described in detail in the sworn affidavits of Richard A. Smith, Chief Executive Officer (dated August 22, 2016) and Geoffrey M. Boyd, Chief Financial Officer (dated August 19, 2016).

Third, a stay of the new rates in *Order on Reconsideration* will not materially harm third parties. In point of fact, it would simply retain the status quo that the D.C. Circuit established

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<sup>1</sup> Order on Reconsideration, WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, FCC 16-102 (rel. Aug. 9, 2016).

and then protected by issuing two stay orders related to the Commission's previous set of ICS rates.

Fourth, a stay of the rates in the *Order on Reconsideration* is consistent with the public interest. The conservation of judicial resources is a recognized public good; entering a stay will avoid yet another trip to the D.C. Circuit to seek immediate relief from unreasonable ICS rates. In addition, entering a stay will mitigate additional consumer confusion regarding which ICS rates they can expect, which is a public benefit that the Commission previously has recognized and protected.

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Securus Technologies, Inc. (“Securus”), through counsel and pursuant to 47 C.F.R. § 1.43, hereby files this Petition for Partial Stay of the order titled *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Order on Reconsideration, FCC 16-102 (rel. Aug. 9, 2016) (“*Order on Reconsideration*” or “*Order on Recon.*”). Specifically, Securus requests a stay of the new Inmate Calling Services (“ICS”) rates adopted in amended Rule 64.6010, 47 C.F.R. § 64.6010. Because these rates would require a great deal of work to implement well in advance of their effective date, Securus respectfully requests that the Commission resolve this Petition by **September 20, 2016**.

### **BACKGROUND**

At its Open Meeting held August 4, 2016, the Commission adopted an order containing new ICS rate caps by a 3-2 vote. On August 9, 2016, the Commission released the *Order on Reconsideration*. The new ICS rate caps are:

PRISONS	\$0.13 per minute
JAILS	\$0.31 per minute for facilities having 0-349 Average Daily Population
	\$0.21 per minute for facilities having 350-999 ADP
	\$0.19 per minute for facilities having 1000+ ADP

The Commission stated that it was “amending our rate caps to better allow providers to cover costs facilities may incur that are reasonably related to the provision of ICS.” *Order on Recon.*

¶ 1. The *Order on Reconsideration* was intended, according to the Commission, to “respond to a petition filed by Michael S. Hamden.” *Id.*

The substance of this order was announced prior to the August 4 Open Meeting in a Fact

Sheet released on July 20, 2016.<sup>2</sup> Several parties, including Mr. Hamden, wrote the Commission urging it not to take the proposed action.<sup>3</sup>

The appeal from the *Second Report and Order*<sup>4</sup> remains underway. All ICS rates adopted in that order have been stayed. *Global Tel\*Link, et al. v. FCC*, Nos. 15-1461 and consolidated cases, Order (Mar. 7, 2016), Order (Mar. 23, 2016). Petitioners filed briefs on or before June 6, 2016. On August 19, 2016, the Commission was ordered to file its full response brief on September 12, 2016. *Id.*, Text Order (Aug. 19, 2016). Its Motion to Hold Cases in Abeyance was denied in full. *Id.*<sup>5</sup> All final briefs are due November 14, 2016. Depending on when it is published in the Federal Register, the *Order on Reconsideration* will likely become effective – as to Prisons – by the end of the year,<sup>6</sup> despite the fact that the ICS rates in the *Second Report and Order* will remain under review.

### **STANDARD FOR ENTERING A STAY**

The Commission applies the four-part test in *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), when reviewing petitions for stay pending appeal.<sup>7</sup> That test

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<sup>2</sup> Fact Sheet, Providing Affordable, Sustainable Inmate Calling Services (July 14, 2016), available at <https://www.fcc.gov/document/providing-affordable-sustainable-inmate-calling-services>.

<sup>3</sup> Letter from Michael S. Hamden to Marlene H. Dortch, FCC, at 2, WC Docket No. 12-375 (July 22, 2016) (providing notice of ex parte meeting with Stephanie Weiner, Senior Legal Advisor to Chmn. Wheeler, and others); Letter from Securus Technologies, Inc. and Pay Tel Communications, Inc. to Marlene H. Dortch, FCC (July 27, 2016).

<sup>4</sup> WC Docket No. 12-375, *Rates for Interstate Inmate Calling Services*, Second Report and Order, FCC 15-136, 30 FCC Rcd 12763 (2015).

<sup>5</sup> In the course of conferring with the FCC regarding that motion, Securus asked the FCC to enter a stay of the new rates pending expedited review in the existing appeal from the *Second Report and Order*. The FCC declined.

<sup>6</sup> *Second Report and Order* ¶ 336.

<sup>7</sup> E.g., *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 23 FCC Rcd. 1705, 1706

is: (1) petitioner is likely to prevail on the merits of its appeal; (2) petitioner will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed by entry of a stay; and (4) the public interest favors a stay.<sup>8</sup> The Commission need not accord each prong of this test equal weight: “If there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors.”<sup>9</sup> For example, “[i]f the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury.”<sup>10</sup> Further, the Court of Appeals for the D.C. Circuit has clarified that a petitioner need not show a “mathematical probability” of success on the merits, but that a “substantial case on the merits” is sufficient if the other factors are satisfied. *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

## **ARGUMENT**

### **I. SECURUS IS LIKELY TO PREVAIL IN ITS APPEAL OF THE *ORDER ON RECONSIDERATION***

Securus is likely to obtain reversal of the new ICS rates and thus satisfies the first criterion for stay of a Commission order.<sup>11</sup>

Section 6 of the Administrative Procedures Act, 5 U.S.C. § 706, states, in pertinent part:

... The reviewing court shall –

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¶ 4 (2008) (granting petition for stay); *Charter Commc’ns Entm’t I, LLC*, Memorandum Opinion and Order, 22 FCC Rcd. 13890, 13892 ¶ 4 (2007) (staying orders setting cable rates); *Comcast Cable Commc’ns, LLC*, File No. CSB-A-0741, Order, 20 FCC Rcd. 8217 ¶ 2 (2005) (staying several orders that set local cable rates).

<sup>8</sup> *TRS Services*, 23 FCC Rcd. at 1706 ¶ 2; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

<sup>9</sup> *TRS Services*, 23 FCC Rcd. at 1707 ¶ 4.

<sup>10</sup> *Charter Commc’ns*, 22 FCC Rcd. at 13892 ¶ 4.

<sup>11</sup> *TRS Services*, 23 FCC Rcd. at 1706 ¶ 4; *Comcast Cable*, 20 FCC Rcd. 8217 ¶ 2.

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ...
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

**A. Entering a Stay at This Time Will Avoid Needless Expenditure of the Commission's, Petitioner's, and the Court of Appeals' Resources**

The *Order on Reconsideration* has created a procedural quandary for the Commission, ICS carriers, and the Court of Appeals, making an immediate stay the only prudent course. The 2015 rates are stayed and under review. The Commission has not yet even defended them to the Court of Appeals, and the appeal will not be resolved until mid-2017 at the earliest. Nonetheless, the new *Order on Reconsideration* rates will become effective by the end of this year, just when briefing on the 2015 rates closes. As discussed in Section I.B. below, the 2015 rates and 2016 rates are, for all practical purposes, the same. Add to that the significant jurisdictional challenges that Petitioners<sup>12</sup> as well as the National Association of Regulatory Utility Commissioners<sup>13</sup> have lodged against the *Second Report and Order* which, it appears, were well received by the D.C. Circuit in its review of the many Motions for Stay, and the *Order on Reconsideration* has very low chances of survival.

Securus understands that the Commission (or at least the three members in the majority) sincerely believe that they have taken the correct actions to remedy what they perceive as unreasonable pricing of ICS. Nonetheless, the Commission should realize that the recent

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<sup>12</sup> *Global Tel\*Link, et al. v. FCC*, Nos. 15-1461 and consolidated cases, Motion of Global Tel\*Link for Partial Stay Pending Judicial Review at 16-18 (Jan. 27, 2016); Oklahoma's Motion for Stay of FCC Rule at 9-11 (Feb. 22, 2016); Joint Brief for the ICS Carrier Petitioners at 39-47 (June 6, 2016) (Pay Tel Communications did not join this argument); Brief of State and Local Government Petitioners at 24-47 (June 6, 2016).

<sup>13</sup> *Global Tel\*Link, et al. v. FCC*, NARUC Petition for Review at 2-3 (Feb. 5, 2016).



decisions of the Court of Appeals signal strongly that Securus and other petitioners have shown a “substantial case on the merits” for overturning regulations that are premised on ignoring a major component of ICS costs, namely site commissions. *Holiday Tours, Inc.*, 559 F.2d at 843.

As the Court explained in *Holiday Tours*, an agency is not expected to second-guess its own decisions in considering a request for a stay.

Prior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. **What is fairly contemplated is that tribunals may properly stay their own orders** when they have ruled on an admittedly difficult legal question and **when the equities of the case suggest that the status quo should be maintained.**

*Id.* at 844-45 (emphasis added). Intellectual honesty must compel the Commission to acknowledge that this standard has been met here, even if it continues to disagree with the petitioners’ arguments.

If the Commission denies this petition, there is every reason to expect that the Court of Appeals will stay the *Order on Reconsideration* in what would be the third order adverse to the FCC in a six-month period and the fourth consecutive stay of ICS rate regulations. Rather than force the ICS petitioners, law enforcement petitioners, and the Court to engage in this theatre of the absurd yet again, the Commission should stay the *Order on Reconsideration* now.

**B. The *Order on Reconsideration* Sets ICS Rates That Are Below Securus’s ICS Costs**

The *Order on Reconsideration* purports to effect two results but succeeds in neither. First it asserts that “[t]he resulting rates will better allow ICS providers to recover their costs of ICS,” *Order on Recon.* ¶ 1, and then postulates that the new rates will “expressly account for reasonable facility costs related to ICS,” *id.* ¶ 3. Neither of these results will be achieved.

The FCC states and intends that the extra funds generated by the “revised rate caps” will go to correctional facilities. *E.g., id.* ¶¶ 1, 2, 3, 4.<sup>14</sup> As such, with respect to ICS providers, the FCC has simply re-adopted the same flawed rate caps that were stayed by the D.C. Circuit and remain under appeal. The Fact Sheet shows this quite plainly:

- 13 cents/minute for debit/prepaid calls, in state or federal prisons (up from 11 cents/minute stayed Oct. 2015 rate)
- 19 cents/minute for debit/prepaid calls in jails with 1,000 or more inmates (up from 14 cents/minute stayed Oct. 2015 rate)
- 21 cents/minute for debit/prepaid calls in jails with 350-999 inmates (up from 16 cents/minute stayed Oct. 2015 rate)
- 31 cents/minute for debit/prepaid calls in jails of up to 349 inmates (up from 22 cents/minute stayed Oct. 2015 rate)

The extra pennies that the Commission has now doled out “for reasonable facility costs” (*Order on Recon.* ¶ 3) are not meant for ICS carriers. ICS carriers will receive the same per-minute rates that were adopted last year. The *Order on Reconsideration* rates therefore remains just as unlawful as the *Second Report and Order* rates which already have been stayed. Those rates are below Securus’s costs of service – calculated, at the FCC’s instruction, without considering the cost of site commissions – which average \$0.1776 per minute.

The FCC has recognized that ICS rates must have profit built into them. *See, e.g., Second Report and Order* ¶¶ 47, 49 (“a fair profit”), 53, 56, 58, 61, 66, 114; *see also First Inmate Rate Order* ¶ 61 (“the costs of providing interstate ICS ... include fair compensation (including a reasonable profit) ...”). As has already been proven and, apparently, accepted by the D.C.

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<sup>14</sup> *Id.* ¶ 4 (“The actions we take today will ensure that all providers can earn sufficient revenues to cover their ICS-related costs while also compensating facilities for reasonable costs incurred directly as a result of providing ICS.”); ¶ 30 (“By adjusting the rate caps to better account for the reasonable costs that facilities may incur in connection with ICS, we ensure that providers will be able to charge rates that cover all of their costs that are reasonably related to the provision of ICS.”).

Circuit, \$0.11-0.22 per minute is not sufficient to ensure carriers a profit. Yet those are the rates ICS carriers would realize under the *Order on Reconsideration*.

Nor does the Commission have any basis to predict that the earmarked rate increases will indeed “expressly account for reasonable facility costs related to ICS[.]” *Order on Recon.* ¶ 3. The increases, according to the Commission, are based on a proposal offered by the National Sheriff’s Association (“NSA”) and a study filed jointly by Darrell Baker of the Alabama Public Service Commission and Don Wood, economist for Pay Tel. *Id.* ¶ 4. The NSA proposal was a good deal higher than what the FCC has adopted and stems from the analysis filed by Praeses, LLC, which acts as agent for hundreds of correctional facilities for the collection of site commissions.<sup>15</sup> The Commission’s hope that the much lower rate increases adopted in the *Order on Reconsideration* “will allow providers and facilities to recover costs they incur” (¶ 4) seems precarious. In any event, the question whether the rate increases are sufficient to reimburse facilities is irrelevant, as shown below: the Commission’s explicit refusal to address site commission obligations enables facilities to demand full satisfaction of existing contracts regardless of the costs they actually incur.

**C. The FCC Has Acted Unreasonably by Failing to Grapple With Contractual Site Commission Obligations While Acknowledging That ICS Carriers Continue to Be Bound by Them**

Turning now to the second of the Commission’s errors, the *Order on Reconsideration*

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<sup>15</sup> Praeses, LLC states that based on a survey of its Correctional Clients the average cost per minute is \$0.18 with a standard deviation of \$0.12. Praeses also states that it believes “the majority of the Correctional Clients did not have sufficient time or resources to account for all of their ICS costs when completing the survey” and, therefore, Praeses believes that “the averages most likely significantly underestimate the ICS costs of certain Correctional Clients.”

WC Docket No. 12-375, Letter from Mary J. Sisak, Counsel to NSA, to Marlene H. Dortch, FCC, at 4 (June 12, 2015).

does not resolve what is known to be the most important, and expensive, aspect of ICS: site commissions. The extra pennies added to the 2015 rates which are designated – but not mandated – for remittance to correctional facilities do not resolve the core issue that, as the Commission knows, is at the heart of this proceeding. ICS carriers have site commission obligations that are guaranteed by contract and are a condition of bidding for service. The Commission has expressly recognized this undeniable fact many times:

- “To have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the inmate facility.”<sup>16</sup>
- “[U]nder most contracts the commission is the single largest component affecting the rates for inmate calling service.”<sup>17</sup>
- “ICS contracts frequently include a site commission or location rent which is paid to the facility and in some instances may go to fund inmate services at the facility.”<sup>18</sup>
- “Indeed, as the Commission has found, competition for ICS contracts may actually tend to increase the rate levels in ICS contract bids where site commission size is a factor in evaluating bids.”<sup>19</sup>

Site commissions, as the Commission knows, can take the form of a percentage-based payment made on ICS revenue. *E.g., id.*, 28 FCC Rcd. at 14124 ¶ 33. The Commission also knows that site commissions can and do take the form of “minimum annual guarantees” which require remittance of a precise sum that is wholly untethered from the amount of ICS revenue generated. *E.g., Second Report and Order* ¶ 262 & n.517; *First Report and Order* n.127 (“Some

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<sup>16</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3276 ¶ 73 (2002).

<sup>17</sup> *Id.* at 3253 ¶ 12.

<sup>18</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Notice of Proposed Rulemaking, 27 FCC Rcd 16629, 16642 ¶ 37 (2012).

<sup>19</sup> *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, First Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14129 ¶ 41 (2013).

correctional facilities that receive percentage-based commissions may also require a ‘Minimum Annual Guarantee’ (‘MAG’) – that is, the ICS provider must contractually guarantee the facility will annually receive at least this MAG amount regardless of the amount of revenue brought in.”). For the 1,500 contracts containing site commissions that Securus holds today, one or both of these types of site commissions is in place. In very few instances, Securus has been able to reduce or eliminate those terms. Correctional facilities simply refuse to re-negotiate site commissions on the belief that federal law does not require them to do so. That is the market reality of which the Commission is well aware.

In fact, Securus implored the Commission to acknowledge that site commission obligations remain binding absent a change of federal law:

- “ICS providers, big and small, will not be able to sustain a business model using rates based on ICS costs but paying out site commissions to cover non-ICS costs. The impending chaos of cancelled contracts and unchecked site commissions will be devastating to the industry.”<sup>20</sup>
- “Under the rate caps listed in the Fact Sheet, there being no rules in the draft order that address site commissions, Securus may be forced to continue paying site commissions on all existing contracts, even though the draft rate caps are significantly below Securus’s cost to provide service.”<sup>21</sup>
- “The draft rate caps are demonstrably below carriers’ reported costs, and to permit unlimited site commissions would preclude ICS carriers from serving most facilities.”<sup>22</sup>
- “For all these reasons, the Commission’s apparent decision not to address site

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<sup>20</sup> WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Chairman Tom Wheeler and Comm’rs Clyburn, Rosenworcel, Pai, and O’Rielly, at 6-7 (Feb. 18, 2015).

<sup>21</sup> WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, at 1 (Oct. 15, 2015) (providing notice of permitted ex parte meeting with Suzanne Tetrault, Deputy General Counsel, *et al.*).

<sup>22</sup> WC Docket No. 12-375, Second *Ex Parte* Submission of Securus Technologies, Inc. at 1 (Oct. 8, 2015) (submitted “in response to requests from FCC Staff to compile applicable portions of the record”).

commissions, but to impose extremely low ICS rates, came as an unwelcome surprise. ... Securus also showed that the draft rate caps are significantly below Securus's costs even without site commissions; if Securus must continue paying site commissions out of such reduced rates, that would make those draft rate caps more than 75% below Securus's costs."<sup>23</sup>

It is not reasonable for an agency to ignore market reality in a ratemaking proceeding. See *MCI Telecommc 'ns v. FCC*, 627 F.2d 322, 344 (D.C. Cir. 1980) (quoting *ABC v. FCC*, 191 F.2d 492, 500-501 (D.C. Cir. 1951) (remanding orders that allowed AT&T WATS tariff to remain in effect despite meritorious challenges). Here, in the *Order on Reconsideration*, as in the *Second Report and Order*, the FCC ignored the market reality of contractual site commissions and thus "failed to consider an important aspect of the problem," which warrants reversal. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). At most, and what may be worse, the FCC does "consider" the issue by promising that ICS carriers will be "reimbursing facilities for any costs," *Order on Recon.* ¶¶ 12, 13, and yet does not truly enable ICS carriers to do so. The FCC has slashed rates to unreasonable depths, expects carriers to pay funds to correctional facilities, and yet refuses to make any express conclusion or rule to that effect which could bring clarity to the market. As such, the twin goals of the *Order on Reconsideration* will not be met, rendering it a frivolous exercise of regulatory power that will not withstand review.

## **II. SECURUS WILL SUFFER IMMEDIATE, IRREPARABLE HARM ABSENT A STAY**

Securus also amply satisfies the second prong of *Virginia Petroleum Jobbers*, because it will suffer irreparable harm if the new ICS rates become effective.

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<sup>23</sup> WC Docket No. 12-375, Letter from Stephanie A. Joyce, Counsel to Securus, to Marlene H. Dortch, FCC, at 1 (Oct. 15, 2015) (providing notice of permitted ex parte meeting with Comm'r Clyburn, *et al.*).

Irreparable harm, according to the D.C. Circuit, “must be both certain and great; it must be actual and not theoretical.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). It includes unrecoverable financial losses as well as recoverable losses that “threaten[] the very existence of the movant’s business.” *Id.* Courts also have found irreparable harm where an agency’s actions would require discontinuance of the affected services. *Penn Central Co. v. Pub. Utils. Comm’n of Connecticut*, 296 F. Supp. 893, 898 (D. Conn. 1969) (enjoining order of Connecticut PUC entered against railroad company).

As shown in the attached Affidavit of Geoffrey M. Boyd, CFO (Aug. 19, 2016), under the new rates Securus will suffer a **\*\* CONFIDENTIAL\*\* \$ Million** annual revenue shortfall. Boyd Aff. ¶ 6 (emphasis in original). That amount is more than **\*\* CONFIDENTIAL\*\* %** of Securus’s revenue in 2015. *See id.* And despite that shortfall, Securus still has **\*\* CONFIDENTIAL\*\* \$ Million** in annual MAG obligations. *Id.* ¶ 5. Securus thus faces “a **\*\* CONFIDENTIAL\*\* \$ Million** loss in net income. *Id.* ¶ 7 (emphasis in original). In 2015, its entire net income was **\*\* CONFIDENTIAL\*\* \$ Million**. *Id.* These losses will be unrecoverable if the new rate caps are vacated after judicial review.

But the losses do not begin with and are not limited to losses in revenue. Simply to implement yet another set of ICS rate caps will be an arduous and expensive task. Richard A. Smith, CEO, states that Securus spent 30,000 person-hours to renegotiate approximately 1500 contracts so that it could be prepared to implement the rates in the *Second Report and Order*, at a cost of **\$3.0 Million**, Smith Aff. ¶ 4 — an expenditure that ultimately was wasted when those rates were stayed at the last minute, and that Securus cannot now recover. The rates in the *Order on Reconsideration* require negotiation all over again – even though as a practical matter Securus would realize the same rates that were in the *Second Report and Order*, the rates imposed on

payors are different and would require new rate implementation. In addition to the costs of re-negotiation are the costs of regulatory compliance, *id.* ¶ 8, and “significant time re-programming our billing system” for the new per-minute rates. *Id.* ¶ 7. System re-programming for the *Second Report and Order* required “7,200 person hours valued at \$720,000.” *Id.* If, as expected, the Court of Appeals stays ICS rate caps again, “all of this work will, once again, be for nothing.” *Id.* ¶ 8.

A further loss that cannot be remedied later and cannot be quantified, because it cannot be reduced to dollar figures, is the loss of customer goodwill arising from the “deal fatigue” (Smith Aff. ¶ 6) of having to re-negotiate contracts twice in less than a year: “If Securus must go back to those 1500 facilities and say we must start the process all over again, those correctional facilities will be furious. They could lose faith in Securus and blame us for this mess – as we are the messenger.” *Id.* Mr. Smith believes that correctional facilities “will also reevaluate their commitment to making ICS available and many have threatened to move their business to a different competitor” after the melee of the last round of re-negotiations. *Id.*

The severity of unrecoverable harm that the *Order on Reconsideration* will cause amply satisfies *Virginia Petroleum Jobbers* and warrants a stay.

### **III. THIRD PARTIES WILL NOT BE HARMED BY A STAY**

Third parties will not be materially harmed by a stay of the *Order on Reconsideration*. The status quo for consumers today is that interstate calls are subject to the FCC’s 2013 rate caps, but all other FCC rates are stayed. Intrastate rates remain subject to state law due to the D.C. Circuit’s two orders that prevented the Commission’s 2015 rates from taking effect. What Securus requests here is simply the continuation of the status quo already imposed by the Court.



As such, third parties cannot claim any cognizable harm from a circumstance that is in keeping with the Court's two directives.

#### **IV. THE PUBLIC INTEREST FAVORS A STAY**

Finally, a stay will satisfy the fourth prong of *Virginia Petroleum Jobbers*, because the public interest will be impaired if the new ICS rates become effective. As explained above in Section I.A., the D.C. Circuit has ordered that the FCC's 2015 ICS rates not go into effect. The 2016 rates are equally unlawful and equally likely to be stayed. It is not in the public interest to force the parties to return to the Court a third time regarding ICS rates which, for the regulated entities that are entitled to reasonable rate regulation, are no different than the previous set of rates. To the contrary, the public interest is served by the conservation of judicial resources wherever possible.<sup>24</sup>

The public interest is also served by avoiding the confusion that arises when rates seem to be in constant flux. The Commission already has received several consumer comments expressing confusion as to which ICS are effective and which are not, and if not, why not. The *Order on Reconsideration* simply muddies the water even further. As the Commission knows, adding to public confusion about calling rates is not in the public interest.<sup>25</sup>

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<sup>24</sup> To analogize, the doctrines of res judicata and issue preclusion rest on the avoidance of "the cost and vexation of multiple lawsuits" and the need to "conserve judicial resources." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Here we are faced with rates that exhibit the same infirmities as those already stayed and that will cause the same harm and irreparable losses. Though this technically is not a matter of estoppel or law of the case, prudence would counsel that another trip to court would bring exactly the same result that is already in place.

<sup>25</sup> We had hoped the Docket No. 19989 record would be sufficient to permit us to affirmatively approve AT&T's tariff filing or prescribe alternatives. However, the record was insufficient to allow us to approve or prescribe rates and we found a 'roll-back' could not serve the public interest basically because of the confusion it would cause for subscribers.

## **CONCLUSION**

For all these reasons, the Commission should stay amended Rule 64.6010 as adopted in the *Order on Reconsideration*. Securus respectfully requests that this Petition be resolved by **September 20, 2016**.

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*Counsel to Securus Technologies, Inc.*

Dated: August 25, 2016

## **CERTIFICATE OF SERVICE**

I hereby certify on this 25th day of August 2016, that the foregoing Petition for Partial Stay of Order on Reconsideration Pending Appeal (FCC 16-102) (PUBLIC VERSION) was served via electronic mail on the following persons:

Chairman Tom Wheeler  
Federal Communications Commission  
Tom.Wheeler@fcc.gov

Commissioner Mignon Clyburn  
Federal Communications Commission  
Mignon.Clyburn@fcc.gov

Commissioner Jessica Rosenworcel  
Federal Communications Commission  
Jessica.Rosenworcel@fcc.gov

Commissioner Ajit Pai  
Federal Communications Commission  
Ajit.Pai@fcc.gov

Howard Symons  
General Counsel  
Federal Communications Commission  
Howard.Symons@fcc.gov

Commissioner Michael O’Rielly  
Federal Communications Commission  
Michael.ORielly@fcc.gov

Lynne Engledow  
Deputy Chief  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
Lynne.Engledow@fcc.gov

Matthew S. DelNero  
Chief  
Wireline Competition Bureau  
Federal Communications Commission  
Matthew.DelNero@fcc.gov

By: s/Stephanie A. Joyce  
Stephanie A. Joyce

# ATTACHMENTS

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**AFFIDAVIT OF RICHARD A. SMITH**

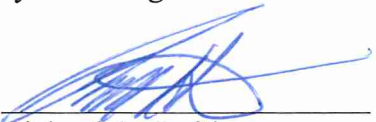
I, Richard A. Smith, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

1. I am the Chief Executive Officer of Securus Technologies, Inc. ("Securus") with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254.
2. I am providing this Affidavit in support of the Petition for Stay of the *Order on Reconsideration*. I have personal knowledge of the facts stated herein and could testify to the same.
3. If Securus is required to implement new Inmate Calling Services ("ICS") rates once again, it will suffer severe and unrecoverable losses. This Affidavit regards the cost of implementation in terms of the resources, time, and customer goodwill that the *Order on Reconsideration* will impose. The Affidavit of our Chief Financial Officer, Geoffrey M. Boyd, discusses the tremendous, irreparable loss of revenue that the new rates will cause.
4. **Contract Renegotiation.** When the *Second Report and Order* was released, Securus renegotiated approximately 1500 contracts as to rates, rate structure, surcharge elimination, and site commissions which now are fully lawful for all types of calls under the rules adopted in that order. Approximately 100 Securus personnel – Account Representatives, regional Vice Presidents, Marketing Associates, and Executives – worked on re-structuring and negotiating these approximately 1500 contracts. The total person-hours totaled over **30,000**, resulting in **\$3.0 Million** worth of Securus labor. After all of that work, the ICS rates in the *Second Report and Order* were stayed by the D.C. Circuit, and most of that work had to be redone because of the successful stay.
5. The *Order on Reconsideration* will require re-negotiation of all of these contracts once again. That work probably will be for nothing, because the new ICS rates are just as unreasonable and wrong-headed as the rates in the *Second Report and Order* that were stayed. And so Securus faces a colossal and needless waste of resources and our customers face extreme confusion.

6. **Loss of Goodwill.** Securus, having just renegotiated all of those contracts less than a year ago, will suffer an inestimable loss of goodwill with correctional facilities if the *Order on Reconsideration* becomes effective. A problem called “deal fatigue” comes clearly into play – correctional facilities are tired of this negotiation and implementation process which takes them away from their primary job of keeping facilities safe and secure. Many believe that this additional work is “Securus’ fault,” even though it was caused by the FCC. If Securus must go back to those 1500 facilities and say we must start the process all over again, those correctional facilities will be furious. They could lose faith in Securus and blame us for this mess – as we are the messenger. They will also reevaluate their commitment to making ICS available and many have threatened to move their business to a different competitor, as if a different competitor could help their confusion.
7. **Cost of Billing System Re-Programming.** The Securus Billing Group and IT Group spent significant time re-programming our billing system to be compliant with the *Second Report and Order* and with the new contract amendments. Approximately 20 Securus personnel spent two months on this project, for a total of **7,200** person hours valued at **\$720,000**. With these new ICS rates, almost everything they did must be re-done. Securus would lose the investment already made, and must re-program the system again. It’s a double loss for Securus.
8. **Regulatory Compliance Work.** As soon as the *Second Report and Order* was released, the Securus Regulatory Group spent months reviewing the intrastate rate regulations of all the states where we serve customers to decide how the new rules meld with state rules and how to implement the new rules on a state-by-state basis. Now the Group is supposed to do all of that work again for the new, deeply flawed ICS rates in the *Order on Reconsideration*. In the likely event that the new ICS rates are found unlawful, all of this work will, once again, be for nothing.

I affirm that the foregoing is true and correct to the best of my knowledge.

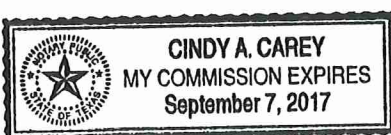
Dated: August 22, 2016

  
Richard A. Smith  
Chief Executive Officer  
Securus Technologies, Inc.

SUBSCRIBED TO AND SWORN BEFORE ME this 22<sup>nd</sup> day of August, 2016.

  
NOTARY PUBLIC

My Commission expires: Sept. 7, 2017



**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

Rates for Interstate Inmate Calling Services

WC Docket No. 12-375

**AFFIDAVIT OF GEOFF BOYD (PUBLIC VERSION)**

I, Geoffrey M. Boyd, hereby affirm under penalty of perjury and pursuant to 18 U.S.C. § 1621, that

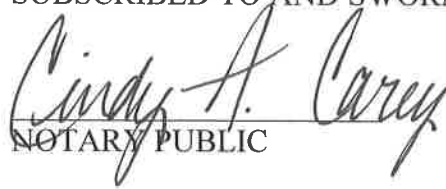
1. I am the Chief Financial Officer of Securus Technologies, Inc. (“Securus”) with headquarters at 14651 Dallas Parkway, Sixth Floor, Dallas, TX 75254.
2. I am providing this Affidavit in support of the Petition for Stay of the Order on Reconsideration. I have personal knowledge of the facts stated herein and could testify to the same.
3. I have been Chief Financial Officer of Securus since September of 2013 and have over 14 years of experience in telecommunications including 10 years as a Chief Financial Officer of a telecommunications service provider. From 2000 to 2007, I was Chief Financial Officer of Echelon Telecom, Inc., and prior to that I held various executive positions at Dobson Communications, one of the largest rural wireless (mobile phone) providers in the country prior to its sale to AT&T.
4. I have reviewed the new Inmate Calling Services (“ICS”) rates that were adopted in the Order on Reconsideration. This Affidavit provides my calculation of the tremendous, unrecoverable losses that Securus will incur if those rates become effective.
5. Securus has obligations to pay Minimum Annual Guarantees (“MAGs”) – a type of site commission – to correctional facilities that total \$ **Million** annually.
6. If Securus were required to implement the new ICS rates, it would lose approximately \$ **Million** in annual revenue. Compare that to Securus’s total calling revenue in 2015 of \$ **Million** – the loss would be substantial.
7. The direct result of this lost income would be a \$ **Million** loss in net income. In 2016, Securus’s net income was \$ **Million**.

I affirm that the foregoing is true and correct to the best of my knowledge.

Dated: August 19, 2016

  
\_\_\_\_\_  
Geoffrey M. Boyd  
Chief Financial Officer  
Securus Technologies, Inc.

SUBSCRIBED TO AND SWORN BEFORE ME this 19<sup>th</sup> day of August, 2016.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission expires: 9-7-2016

